88-1565

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1989

RICHARD ALAN LEEMIS,

Petitioner,

v.

HOSPITAL CORPORATION OF AMERICA (HCA),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Richard Alan Leemis,
Petitioner
1629 Kimbrough Road
Germantown TN 38138
(901) 757-0067

QUESTION PRESENTED

Whether Section 12 of the ADEA [29 U.S.C.§631(a)] is an absolute bar to District Court jurisdiction in cases where a Plaintiff is under the age of 40 years and where one or more of ADEA. Section 12 clauses (a)(3), (c)(3) or (d) [29 U.S.C. §623] have been alleged to have been violated or a legal subterfuge has been alleged to undermine the intent of the ADEA.

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STATUTES AND RULES

Age Discrimination in Employment Act 29 U.S.C. §631(a)	2, 3, 4, 6
29 U.S.C. §623(a)(3),(c)(3) or (d)	1, 6
29 U.S.C. §621 et seq	4
28 U.S.C. 1254(a)	1
Federal Rules of Civil Procedure 12(b)(6)	10

OTHER AUTHORITY

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"Managements Red Herrings: Attempts to Circumvent the Age Discrimination in Employment Act," by Walter T. Champion, Jr., 50 Texas Bar Journal 506(4), May 1987.	7

OPINIONS BELOW

Order of Dismissal 88-207-44, Filed April 8, 1988, District Court Western District of Tennessee (Western Division).

Order affirmed O.D. 88-5595, Filed November 21, 1988, U. S. Court of Appeals for the Sixth Circuit

JURISDICTION

The judgement of the Court of Appeals was entered on November 21, 1988. The original filing date of this writ was February 21, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

It shall be unlawful for an employer to reduce the wage rate of any employee in order to comply with this Act. Section 4 (a)(3) of the ADEA [29 U.S.C. §623(a)(3)].

It shall be unlawful for a labor organization to cause or attempt to cause an employer to discriminate against an individual in violation of this section. Section 4 (c)(3) of the ADEA [29 U.S.C. §623(c)(3)].

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any

individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership, has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or litigation under this Act . Section 4(d) of the ADEA [29 U.S.C. §623(d)].

The prohibitions in this Act (except the provisions of section 4(g)) shall be limited to individuals who are at least 40 years of age. Section 12 of the ADEA {29 U.S.C. §631(a)].

STATEMENT OF THE CASE

On February 3, 1987, the Plaintiff, Richard A. Leemis, was terminated from his position at the Defendant, Hospital Corporation of America (HCA). On September 25, 1987, the Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission and The Tennessee Human Rights Commission. In this charge the Plaintiff alleged that his termination from HCA was part of a

cover up that was initiated by the Defendant to hide other alleged ADEA violations committed by the Defendant, HCA.

In January 29, 1988 the Plaintiff filed suit in the U. S. District Court for the District of Tennessee, Western Division. The complaint stated that the action was brought pursuant to the Age Discrimination in Employment Act Title 29 of the U. S. Code.

On February 23, 1988, the Defendant moved that the Court dismiss this suit on grounds that the complaint raised no federal question. On March 9, 1988, the Plaintiff amended his Complaint to more properly address the federal question involved. Judge McRae later allowed this amendment to the complaint. On March 24, 1988, the defense submitted a document that was not properly served upon the Plaintiff and contained an error in the quotation of the applicable statute. [ADEA Section 12 (29 U.S.C. §631(a)]. The word "provisions" was substituted for "prohibitions" thus changing the meaning of the critical statute. In spite of the Plaintiff's request for the mis-served pages, on April 8, 1988, the Honorable Robert M. McRae, Senior District Judge for the Western Division of Tennessee dismissed the Complaint for

lack of subject matter jurisdiction (See Appendix B). On the third page of this Order of Dismissal, Judge McRae stated:

> "...Defendant has provided a copy of the charge Plaintiff filed with the EEOC and the affidavit of Scott Hoffman, one of its officers, both of which indicate plaintiff was thirty-two years of age when he was discharged. The ADEA protects only those individuals who are at least forty years of age. [29 U.S.C. §631(a).]"

The plaintiff filed a Notice of Appeal on May 9, 1988. In his brief to the Sixth Circuit Court of Appeals, the Plaintiff-Appellant argues that:

> 1. The plain language of the ADEA [29 U.S.C. §621, et seq.] does not exclude all persons under 40 years from protection under the act. (p. 10-14).
>
> 2. Judicial precedent has allowed those under the age of 40 years limited protection under the ADEA statutes. Merkel v. Scoville, Inc., 787 F.2d 174 (6th Cir. 1986).
>
> 3. By dismissing the case the Plaintiff was prevented from presenting to the Court ample evidence that suggests that the real motive of the Defendant, HCA, was to create a subterfuge to the ADEA statutes. (pp. 21-25).

In its brief, the Defendant argues that:

> 1. "Section 631(a) ...grants standing ... only to individuals who are 40 years of age or older. " (p. 6).

2. "Since ... enactment ... the ADEA has been amended twice without modification of the minimum age requirement. That ... provides further evidence of the clear congressional intent to protect only persons 40 years of age and older." (p. 6).

3. The Plaintiff cannot "bootstrap" himself onto the rights of others for recovery under the Act. (The Plaintiff's) claim of age discrimination was therefore properly dismissed by the District Court..." (pp. 11-12).

In his reply brief the Plaintiff-Appellant counters by stating that:

1. The Defendant-Appellee has defended its position by making several misstatements of fact including misrepresenting the decision of the Court in Merkel v. Scoville, Inc. 787 F. 2d 174 (6th Cir. 1986) (pp. 2-3).

2. The Defendant continues to misrepresent the Plaintiffs complaint and EEOC charge. (p. 3-4).

3. The Defendant's challenge to the standing of the Plaintiff to sue under the ADEA is not substantiated and constitutes a sham argument. (p. 8).

The Sixth Circuit Court of Appeals issued an order on November 21, 1988, upholding the dismissal of the Plaintiff's Complaint. (See Appendix A). The court states:

After consideration of the record in light of the arguments contained in the brief s the Court concludes that the District Court did not err in dismissing Plaintiff's Complaint. (p. 2).

No further explanation of the Courts reasoning is provided.

REASONS FOR GRANTING THE WRIT

As in this case, lower courts have frequently, although not consistently, interpreted Section 12 of the ADEA [29 U.S.C. §631(a)] to control jurisdiction over all aspects of the ADEA. This interpretation is made in spite of clear language indicating the contrary in the legislation itself [29 U.S.C §623(a)(3), (c)(3), (d)].

Frequent reliance upon the standard established in McDonnell Douglas v. Green, 411 U.S. 793, 93 S.Ct. 1817, 36 L.Ed. 688 (1973), is often cited as authority. However, in Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-578, 98 S.Ct. 2943, 2940-50, 57, L.Ed. 2d 957 (1978), Justice Rehnquist wrote:

> "The method suggested in McDonnell Douglas for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic."

Much confusion on this issue exists. The Court needs to settle this issue in a manner consistent with the statute and with past appellate Court practice. In overturning a judgment

favorable to a 30 year old ADEA Plaintiff, Merkel, the Sixth Circuit found the age of the Plaintiff [573 F.Supp. 1055, 1058] unremarkable [787 F.2d 174 (6th Cir. 1986)]. This outcome is consistent with Justice Rehnquist's opinion in the Furnco case and is consistent with the legislative language.

The defendant, HCA, has misrepresented the Merkel v. Scoville, [787 F.2d 174 (6th Cir. 1986) decision in its appellate brief. (Brief of Appellee pp. 10-11). The Defendant maintains that the Plaintiff Merkel only sought recovery for retaliatory discharge, a state claim. Although the Defendant has refused to acknowledge the applicability of the Merkel decision, an individual under the age of 40 has been permitted to pursue a substantive claim of age discrimination under the ADEA.

The Plaintiff has alleged that the Defendant, HCA, created devices and engaged in subterfuges in order to undermine the ADEA.

The prevalence of this type of behavior was highlighted recently in an article titled, "Managements Red Herrings: Attempts to Circumvent the Age Discrimination in Employment Act" by Walter T. Champion, Jr. [50 Texas Bar Journal 506(4), May 1987].

> The Age Discrimination in Employment Act of 1967 (ADEA) was implemented "to encourage and protect the employment of older persons based on ability rather than age" and to prohibit arbitrary age employment discrimination.
>
> This noble Act, however, has recently been the victim of attempts by employers to circumvent its mission and purpose by the use of pretexts, shams and subterfuges. This is accomplished by company policies that appear fair-minded but are actually disingenous ploys to avoid the Act. Management has, in effect, created red herrings in their employment policies as a means to disregard the Act and thus pattern their hiring and firing procedures on illegal age based criteria. (Id., at 506) The red herrings here are management's contrived employment policies and practices that appear on the surface to be harmless, innocent, and rationally related to a legitimate goal. (Id., at 508).

The Plaintiff alleges that HCA used the tool of mass termination and paired termination to defeat the purposes of the ADEA. The Courts have intervened when it is necessary to prevent a transparent evasion of the Act. See Pfieffer v. Wm. Wrigley, Jr., Co., 755 F.2d 554 (7th Cir. 1985). This systematic cover-up has been alleged in every Plaintiff's document from the EEOC charge forward. The power of major corporations to defeat the purposes of the ADEA is overwhelming. The Defendant, with a staff of 89,000 employees, is able to bury individual cases of race, age and

sex discrimination in its annual restructuring, reorganization and "cutbacks." In spite of steady profits from operations, HCA is constantly in a state of "restructuring" or "reorganization." This continual state of uncertainty goes back to the 1970's or earlier. In spite of growing employment and growing profitability, HCA has made a corporate policy of engaging in mass termination. Months after termination when most of the terminated employees have quietly found their way back into the company the real target or targets of the purge become evident. The law firm of Ford and Harrison of Atlanta is consulted concerning strategy before every termination. Frequently terminations are paired such that a younger employee is terminated with an employee over age 40.

The Plaintiff believes that HCA and its legal counsel have been successful in using this strategy against its employees partially because of the perception in the legal community that no one under the age of 40 is protected by the ADEA. Clarification of the standard will help employees to better understand their rights and will prevent large corporations like the Defendant from using mass termination as a tool to defeat the ADEA.

The grant of a Motion to Dismiss pursuant to the Federal Rules of Civil Procedure 12 (b)(6)is appropriate only when:

> "... it appears beyond doubt that Plaintiff can prove no set of facts in support of [his] claims which would entitle [him] to relief. Conley v. Gibson, 355 U.S. 41, 45-46.

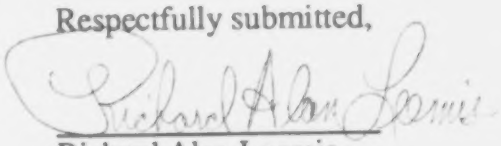
In ruling on a Motion to Dismiss, the Court must view the Complaint in the light most favorable to the Plaintiff and resolve every doubt on his behalf. See Jenkins v. McKeithen, 395 U.S., 411, 421-422 (1969).

The plaintiff has shown beyond doubt that it is possible for an individual under the age of 40 to pursue a substantive claim of age discrimination under the ADEA. The District Court failed to examine the motives of the Defendant in terminating Plaintiff and consequently did not resolve all issues before it. The civility upon which all law depends is being undermined by large corporations such as the Defendant and their legal council who consider the ADEA just another civil rights statute in need of an evasive litigation strategy.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Richard Alan Leemis
Plaintiff

APPENDIX A

No. 88-5595

UNITED STATES COURT OF APPEALS
OF THE SIXTH CIRCUIT

RICHARD ALAN LEEMIS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
HOSPITAL CORP. OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

BEFORE: ENGEL, Chief Judge, JONES, Circuit Judge; and THOMAS, Senior District Judge.*

This pro se plaintiff appeals a judgment of the district court which dismissed his cause of action based upon both the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and state contract and tort law. He now moves for leave to amend his complaint and for decision of the appeal on the basis of the briefs. Upon review of the record, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Plaintiff, Richard Alan Leemis, filed a complaint in the District Court for the Western District of Tennessee. As the

*The Honorable William K. Thomas, Senior U.S. Distrit Judge for the Northern Distrit of Ohio, sitting by designation.

basis of his claim for both compensatory and punitive damages, he alleged that defendant, Hospital Corporation of America, had illegally terminated his employment in violation of state contract and tort law and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. The district court, however, dismissed the complaint based upon the conclusion that plaintiff's cause of action under that statute was so clearly devoid of merit as to not invoke federal subject matter jurisdiction. Accordingly, the district court also determined that it no longer enjoyed pendent jurisdiction over plaintiff's remaining state law claims and therefore entered a judgment dismissing the complaint in its entirety. Plaintiff then filed this appeal.

After consideration of the record in light of the arguments contained in the briefs, the court concludes that the district court did not err in dismissing plaintiff's complaint. Accordingly, the motions for leave to amend the complaint and for decision of the appeal on the briefs are hereby denied and

the district court's final judgment is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/s Leonard Green
Clerk

MANDATE ISSUED: 12/14/88
COSTS TAXED: NONE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RICHARD ALAN LEEMIS,

Plaintiff,

VS. NO. 88-2071-4A

HOSPITAL CORPORATION OF AMERICA,

Defendant.

ORDER OF DISMISSAL

Presently before the Court are defendant's Motion to Dismiss and plaintiff's Motion to Amend the Complaint. Plaintiff, who is pro se, has submitted a response to the Motion to Dismiss. Defendant has replied to plaintiff's response, but has not yet filed an answer.

Addressing the Motion to Amend first, the Court notes that Rule 15(a) provides in pertinent part: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served...." A complaint may therefore be amended without leave of the Court at any time before an answer is served. 6 C. Wright & A. Miller, Federal

Practice and Procedure §1482, at 410. Accordingly, as no answer has been filed, plaintiff's amendment is allowed. See Butler v.McDonnell-Douglas Saudi Arabia Corp., 93 F.R.D. 384, 389 (S.D. Ohio 1981).

Defendant has moved to dismiss the complaint alleging subject matter jurisdiction is lacking. Plaintiff contends "federal question" jurisdiction exists. Both the original complaint and the amended complaint assert a claim based upon the Age Discrimination in Employment Act. ("ADEA "), 29 U.S.C. §621 et seq. Complaint ¶ 14; Amended Complaint ¶¶14, 37-46. Defendant does not seek dismissal under Rule 12(b)(6) for failure to state a claim, rather, defendant contends: "The matter in controversy herein, as shown by the allegations of the complaint, does not arise under the Constitution or any law or treaty of the United States." Memorandum in Support of Defendant's Motion to Dismiss Complaint at 1. Inexplicably, defendant's motion makes no mention of the ADEA allegation in the original complaint, although its reply does make the suggestion that plaintiff has no standing to bring an ADEA claim. Defendant's Reply to Plaintiff's

Memorandum in Response to Defendant's Motion to Dismiss Complaint at 2.

This Court clearly has subject-matter jurisdiction over a claim brought under the ADEA. See 29 U.S.C. § 626(c)(1). Plaintiff expressly cites the ADEA and contends he was discharged because of his age. Given the general rule that pro se complaints are to be liberally construed, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), this might be found sufficient to satisfy the jurisdictional pleading requirement of Rule 8(a)(1) despite the absence of any allegation that plaintiff's age places him in the protected class. However, defendant has provided a copy of the charge plaintiff filed with the EEOC and the affidavit of Scott Hoffman, one of its officers, both of which indicate plaintiff was thirty-two years of age when he was discharged. The ADEA protects only those individuals who are least forty years of age. 29 U.S.C. § 631(a).

If a claim upon which subject-matter jurisdiction is based is so "attenuated and unsubstantial as to be absolutely devoid of merit," Newburyport Water Co. v. Newburyport, 193 U. S. 561, 579 (1904), or "frivolous," Bell v. Hood, 327 U.S. 678, 683 (1946), dismissal of the complaint on the

ground of lack of subject-matter jurisdiction is warranted. Plaintiff's age places an inescapable barrier in the path of his ADEA claim, the sole basis of subject-matter jurisdiction alleged or apparent from the face of the amended complaint. Accordingly, the Court must conclude that plaintiff's federal law cause of action is frivolous and devoid of merit. Defendant's Motion to Dismiss should therefore be granted.

For the reasons stated, this cause is dismissed and the Clerk is directed to enter a final judgment accordingly.

IT IS SO ORDERED.

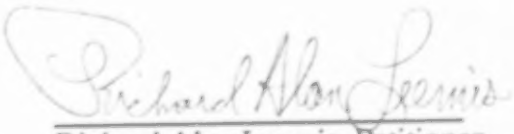
ENTER: This 7th day of April, 1989.

s/s Robert M. McRae
ROBERT M. McRAE
SENIOR UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of March, 1989 served forty copies of the foregoing WRIT OF CERTIORARI upon the party indicated below by placing same in the United States mail, postage prepaid, addressed as follows:

Clerk, Supreme Court of the United States
One F Street, N.E.
Washington, D.C. 22303



Richard Alan Leemis, Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of March, 1989 served three copies of the foregoing WRIT OF CERTIORARI upon the party indicated below by placing same in the United States mail, postage prepaid, addressed as follows:

Paula A. Hilburn
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 888-3800

Richard Alan Leemis

Richard Alan Leemis, Petitioner